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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

STEFANO GIOVACCHINI, et al.,  
Plaintiffs,  
v.  
CINCINNATI INSURANCE COMPANY,  
Defendant.

Case No. 22-cv-07787-LB

**ORDER REGARDING REBUTTAL  
EXPERT TESTIMONY**

Re: ECF No. 47

**INTRODUCTION**

This is a dispute about whether the plaintiffs' rebuttal expert's opinions are appropriate rebuttal opinions. The plaintiffs sued the defendant under their homeowners' policy for water damage to the interior and exterior of their home resulting from a storm. The defendant's expert gave his opinion about the costs to repair the interior damage. He did not assess the costs of exterior repairs, and he did not opine about covered loss under the insurance contract. The plaintiffs designated a rebuttal expert, who is a lawyer, to testify about (1) damages from the water and costs of repair and (2) and the expert's assumptions that caused him to calculate damages only for interior repairs (and not exterior repairs). They did not disclose a report, the expert's CV, or other mandatory disclosures under Fed. R. Civ. P. 26(a)(2)(B). The defendant moved to strike the expert and exclude his testimony on the grounds that the plaintiffs did not comply with Rule 26(a)(2)(A), and the expert's opinions either duplicate the originally disclosed experts or are

1 outside the scope of the initial expert testimony. The plaintiffs did not comply with Rule  
2 26(a)(2)(B), but they can cure that error. On this record, the rebuttal opinions either duplicate  
3 information that should have been in the plaintiffs' initial reports or are outside the scope of the  
4 defendant's expert opinions. They thus are not appropriate rebuttal opinions.

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## 6 STATEMENT

7 This is an insurance-coverage case involving the plaintiffs' claim under their homeowners'  
8 policy for interior and exterior water damage from a major storm (characterized as "a massive  
9 bomb cyclone and atmospheric river").<sup>1</sup> After the defendant denied coverage, the plaintiff sued for  
10 breach of contract and breach of the implied covenant of good faith and fair dealing.<sup>2</sup>

11 The parties disclosed their experts on August 23, 2024.<sup>3</sup> The plaintiffs designated two experts.

12 First, they designated James Range of Range & Associates to testify on the following topics:

13 (1) cause and origin of the subject water damage; (2) scene analysis (3)  
14 reconstruction; (4) damage resulting from the water intrusion; (5) construction  
15 practices related to waterproofing residential structures; (6) forensic investigation  
16 principles related to water intrusion in residential structures; (7) water staining and  
17 mold; (8) design and construction of plaintiffs' residence, including the water  
18 drainage system; (9) analysis of any borescope or other imaging; (10) general  
property damage; (11) scope of repair; (12) cost of repair; and (13) any other  
subjects or opinions referenced in his report or in subsequent deposition testimony,  
including reasonable inferences arising therein.<sup>4</sup>

19 Second, they designated Gabe Moufarrej of GEM Builders as a non-retained expert to testify  
20 on the following topics:

21 (1) the water intrusion incident; (2) the cause and origin of the water intrusion; (3)  
22 the design of the subject property where the water intrusion occurred; (4) the  
23 construction of the subject property where the water intrusion occurred; (5) water  
proofing; (6) the condition of the deck; (7) maintenance of the subject property,

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25 <sup>1</sup> Compl., Ex. A to Notice of Removal – ECF No. 1-1 at 4 (¶¶ 5–6); 5 (¶¶ 9–10). Citations refer to  
material in the Electronic Case File (ECF); pinpoint citations are to the ECF-generated page numbers  
at the top of documents.

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27 <sup>2</sup> *Id.* at 5–6 (¶¶ 15–18); 6–9 (¶¶ 20–45)

28 <sup>3</sup> Mrowka Decl. – ECF No. 47-1 & Disclosures., Exs. A-B to *id.*

<sup>4</sup> Pls.' Disclosure., Ex. A to *id.* – ECF No. 47-1 at 6 (p. 2:1–8).

1 including the deck; (8) scope of repair; (9) cost of repair; and (10) mitigation  
2 efforts.<sup>5</sup>

3 The defendant disclosed two retained experts, Sean Hallet, P.E., to opine on the cause and  
4 origin of the claimed damage, and Jeff Jones of Young & Associates to opine on the scope and  
5 cost of repairs.<sup>6</sup> The disclosure of Mr. Jones's expert opinion is the relevant disclosure:

6 YOUNG and Associates (YA) was retained . . . for the purpose of:  
7

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- 9 • Review and provide comment on Insured's Contractor GEM Builders repair  
10 scope and costs.
- Identifying the necessary scope of repair work to be performed at the  
property due to water intrusion.
- Estimating the repair costs associated with the interior water damage to the  
property.

11 YA was neither retained to opine as to any aspect of insurance coverage nor to  
12 provide any origin and cause determination.

13 The scope of work was limited to resulting water damage only to interior finishes  
14 and excludes any repairs to existing structural members which would appear to be  
15 long term exposure to moisture, any exterior repairs or exterior work related to the  
correction of construction deficiencies leading to the cause of the water intrusion to  
the interior of the residence, and any interior or exterior finishes removed to facilitate  
repairs related to structural or exterior building envelope repairs.<sup>7</sup>

16 On September 20, 2024, the plaintiffs designated their rebuttal expert Tim Larsen, who is an  
17 attorney and a public adjuster, to opine on the following topics:

18 (1) the scope of services and assumptions underlying the Jeff Jones expert report;  
19 (2) insurance coverage under the CIC policy; (3) the scope of repair; (4) damage  
20 resulting from the water intrusion; (5) cost of repair; and (6) any other subjects or  
opinions referenced in his report or in subsequent deposition testimony, including  
reasonable inferences arising therein. . . .

21 . . .

22 Mr. Larsen will opine that the assumptions underlying the Jeff Jones report regarding  
23 the limitation to resulting water damage only to interior finishes and excluding any  
24 repairs to existing structural members misstates the coverage obligation CIC has  
under the subject policy. Accordingly, Mr. Jones' estimating process and subsequent  
itemized cost estimate understates the amount of costs to which the plaintiffs are

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26<sup>5</sup> *Id.* (p. 2:15–19).

27<sup>6</sup> Def.'s Disclosure, Ex. B to Mrowka Decl. – ECF No. 47-1 at 14–59.

28<sup>7</sup> *Id.* at 53.

1                   entitled. Moreover, the repair costs charged by GEM Builders falls within a  
2 reasonable range of repair costs given the damages covered by the subject policy.

3                   The disclosure did not include a report, any exhibits, a CV, a list of publications, or other cases  
4 where the expert testified.<sup>8</sup> See Fed. R. Civ. P. 26(a)(2) (required expert disclosures).

5                   The defendants' experts were deposed on October 16, 2024. No questions were asked about  
6 insurance coverage, and neither expert opined on the topic of insurance coverage.<sup>9</sup>

7                   The court held a hearing on December 5, 2024.

## 8                   ANALYSIS

9                   The defendant moved to strike the plaintiffs' rebuttal-expert disclosure and exclude the expert  
10 on the grounds that the disclosure did not comply with Fed. R. Civ. P. 26(a)(2)(B), and it is not  
11 rebuttal testimony. On this record, the opinions are not proper rebuttal testimony.

12                  When a party retains an expert witness, the disclosure must be accompanied by a written  
13 report, prepared and signed by the expert, with the following information:

- 14                  (i) a complete statement of all opinions the witness will express and the basis and  
15 reasons for them;
- 16                  (ii) the data or other information considered by the witness in forming them;
- 17                  (iii) any exhibits that will be used to summarize or support them;
- 18                  (iv) the witness's qualifications, including a list of all the publications authored in  
the previous 10 years;
- 19                  (v) a list of all other cases in which, during the previous four years, the witness  
testified as an expert at trial or by deposition; and
- 20                  (vi) a statement of the compensation to be paid for the study and testimony in the case.

21                  Fed. R. Civ. P. 26(a)(2)(B)(i)–(vi). Rebuttal reports are “intended solely to contradict or rebut  
22 evidence on the same subject matter identified by another party” in that party’s expert disclosures.

23                  Fed. R. Civ. P. 26(a)(2)(D)(ii). Parties are not allowed to use a rebuttal report as a “backdoor to  
24 introduce analysis that could have been included in the opening report.” *City & Cnty. of S.F. v.*  
25 *Purdue Pharma L.P.*, No. 18-CV-07591-CRB, 2022 WL 1203075, at \*2 (N.D. Cal. Apr. 22,

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27                  <sup>8</sup> Pls.’ Rebuttal Disclosure, Ex. C to Mrwoka Decl. – ECF No. 47-1 at 61–65.

28                  <sup>9</sup> Mrwoka Decl. – ECF 47-1 at 2 (¶ 6).

1 2022). The deadline for disclosures for rebuttal experts is thirty days after the other party's  
2 disclosure. Fed. R. Civ. P. 26(a)(2)(D)(ii). "If a party fails to provide information or identify a  
3 witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness  
4 to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially  
5 justified or is harmless." Fed. R. Civ. P. 37(c)(1) (allowing other sanctions instead of or in  
6 addition to this sanction, including attorney's fees caused by the failure, informing the jury of the  
7 failure, or imposing other sanctions listed in Rule 37(b)(2)(A)(i)–(vi)); *Yeti by Molly, Ltd. v.*  
8 *Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001).

9 The plaintiffs admit that they did not comply with the expert disclosure rules, explain that they  
10 recognized the need to rebut Mr. Jones's testimony only "shortly before the rebuttal deadline  
11 became due," and offer to correct the procedural errors.<sup>10</sup> If this were the only error, then the court  
12 would allow that remedy and would entertain the defendant's motion under Rule 37(c)(1) for any  
13 attorney's fees caused by the failure. The main issue thus is whether the testimony is proper  
14 rebuttal testimony.

15 The defendant contends that because they did not designate their witnesses to opine on coverage,  
16 the plaintiffs' rebuttal witness is not a legitimate rebuttal witness on this issue. Any other opinions are  
17 part of the plaintiffs' case in chief and duplicate the originally disclosed experts.<sup>11</sup> The plaintiffs  
18 counter that the scope of services analyzed by Mr. Jones — damage to the home's interior — was  
19 based on the defendant's "policy determination that only interior repairs were covered by the policy."  
20 It cannot impeach Mr. Jones because assessing exterior repairs was outside the scope of his  
21 retention.<sup>12</sup> The plaintiffs thus offer their rebuttal expert's testimony "regarding the arbitrary  
22 restrictions and limitations imposed by Defendant on the scope of its own expert's analysis, and a  
23 discussion of how those limitations impacted and undervalued the resulting opinions."<sup>13</sup> They also  
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26 <sup>10</sup> Opp'n – ECF No. 48 at 5–6.

27 <sup>11</sup> Mot. – ECF No. 47 at 7–9; Reply – ECF No. 49 at 5.

28 <sup>12</sup> Opp'n at 2–3.

<sup>13</sup> *Id.* at 3.

1 intend to offer his “declaration in support of their motion for summary judgment based on the  
2 insurance coverage.”<sup>14</sup>

3 To the extent that Mr. Jones testifies about coverage issues, that issue seemingly is not rebuttal  
4 testimony. He also cannot “introduce analysis that could have been included in the opening  
5 report.” *City & Cnty. of S.F.*, 2022 WL 1203075, at \*2.

6 The plaintiffs cite no cases that have allowed rebuttal testimony like the testimony they propose.  
7 They cite *Rowe v. DPI Speciality Foods, Inc.*, for the proposition that a rebuttal expert can address  
8 the initial expert’s assumptions. No. 2:13-cv-00708-DN-DJF, 2015 WL 4949097 at \*4, 6 (D. Utah  
9 Aug. 19, 2015). But that case concerned the reliability of principles and methods. Of course experts  
10 can challenge the underlying methodology. But all that is involved here is the scope of work. The plaintiffs  
11 assert that exterior repairs are covered by the policy, and the defendants contend that they  
12 are not (and limited the scope of their damages expert accordingly). The plaintiffs’ other cases  
13 similarly can be distinguished on the ground that they involved challenges to methodology, not a  
14 challenge to a party’s telling its experts to calculate the costs of repairs only to part of the property.  
15 *Slicex, Inc. v. Aeroflex Colo. Springs, Inc.*, No. 2:04-cv-615-TS, 2006 WL 1932344, at \*3 (D. Utah  
16 July 11, 2006) (allowed rebuttal expert to address the methodology and assumptions used by the  
17 plaintiff’s expert); *Pandora Jewelers 1995, Inc. v. Pandora Jewelry, LLC*, 09-61490-Civ., 2011 WL  
18 2295269 at \*6 (S.D. Fla. June 8, 2011) (rebuttal expert could challenge the initial expert’s  
19 apportionment of sales as profits and testify about the mathematical and economic reasons why the  
20 use of national sales and profit figures were incorrect).

21 On this record, then, there is no basis to conclude that the plaintiff’s rebuttal expert can  
22 provide a rebuttal opinion to the initial expert’s opinion: either it is an opinion that could have  
23 been in the initial report or it is improper rebuttal testimony about coverage that is outside the  
24 scope of the original expert’s opinion. Also, the coverage issue seemingly is a question of law for  
25 the court, not a fact issue. *Devin v. United Servs. Auto. Assn.*, 6 Cal. App. 4th 1149, 1157 & 1158  
26 n.5 (1992) (cleaned up) (“The interpretation of the scope of a policy is a question of law, as is

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28 <sup>14</sup> *Id.* at 5–6.

1 whether an insured could reasonably expect a defense under the policy. Experts may not opine on  
2 pure questions of law, and expert opinions on legal questions do not inhibit a grant of nonsuit.”)  
3 The issue also will be evident at any trial through direct and cross-examination of the witness.

4 A problem, however, is that the court does not have the rebuttal expert’s report because the  
5 plaintiffs did not disclose it. If the plaintiffs disclose a report (curing the Rule 26(a)(2)(B)  
6 procedural issues), then the parties can raise anything in the report that changes this analysis. If the  
7 plaintiffs elect that route, then they must disclose the report or provide a timeline for doing so by  
8 December 19, 2024. The defendant can reserve any Rule 37(c)(1) motion for sanctions in the form  
9 of attorney’s fees until after the expert issues have been resolved.

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11 **CONCLUSION**

12 The court grants the defendant’s motion. This resolves ECF No. 47.

13 **IT IS SO ORDERED.**

14 Dated: December 10, 2024



15  
16 LAUREL BEELER  
17 United States Magistrate Judge  
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